

**FAIR POLITICAL PRACTICES COMMISSION**  
**Memorandum**

**To:** Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

**From:** Emelyn Rodriguez, Counsel, Legal Division  
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**Subject:** Adoption of Amendments to Regulation 18944 – Family Gift Regulations

**Date:** June 26, 2006

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**I. EXECUTIVE SUMMARY**

This memorandum addresses proposed amendments to regulation 18944 relating to “gifts” received by immediate family members of candidates and officials under the Political Reform Act (the “Act”)<sup>1</sup>. These amendments are proposed to clarify existing regulatory language and to further incorporate the Commission’s decision in the Commission opinion, *In re Cory* (1976) 2 FPPC Ops. 48.

The Commission at its February 2006 meeting considered proposed amendments to regulation 18944 (in conjunction with amendments to regulation 18942—Gift Regulations involving Wedding Gifts, Baby Showers and Receptions) that would have merely added a specific provision stating that gifts given directly to an official but intended for use by the official’s child (such as baby shower gifts), are gifts to the child. During the meeting, there was public comment requesting that the Commission look into making further clarifying amendments to the regulation. There was also a request to further codify the portion of the *Cory* opinion referring to circumstances negating intent by a donor to make an indirect gift to an official.

The Commission instructed staff to craft clarifying amendments to regulation 18944, as well as add language further codifying the *Cory* opinion. Staff held an Interested Person’s meeting (“IP meeting”) in May, and received additional public comments. Some of these suggestions were incorporated in the revised language noticed with the Office of Administrative Law (“OAL”) for adoption at the Commission’s July meeting. No further comments have been received.

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

## II. BACKGROUND AND AUTHORITY

Staff's previous prenotice memoranda had a thorough discussion of the applicable statutes and regulations.<sup>2</sup> Some of the main points are briefly summarized below for easy reference.

The Act places certain restrictions and reporting requirements on the receipt of gifts by public officials and candidates. Elected officials, candidates for elective office, and certain state agency officials and designated employees who accept gifts, are subject to gift reporting rules, gift limits and disqualification rules.

*Definition of Gift:* A gift is defined in section 82028(a) as "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status." This section and Commission regulations, discussed below, also provide exceptions to the definition of "gift."

*What is Not a Gift:* The Act provides for certain exceptions to the definition of "gift" including: informational material, gifts that are not used and returned within 30 days of receipt and gifts from certain enumerated family members, among other things. (Section 82028(b).) For example, presents exchanged at holidays, birthdays or similar occasions are not reportable nor subject to gift limits provided that the gift exchanged is not substantially disproportionate in value. (Regulation 18942(a)(8).)

*Gifts to Candidates' and Officials' Immediate Family Members:* Currently, regulation 18944(a) provides that "[g]ifts given directly to members of an official's immediate family are not gifts to the official unless used or disposed of by the official or given by the recipient member of the official's immediate family to the official for disposition or use at the official's discretion."

In addition, there are rules regarding gift reporting, gift limits and disqualification, which were discussed in detail in the prenotice memorandum.

### *Gifts to Candidates' and Officials' Immediate Family Members*

Regulation 18944 reflects Commission opinion on the question of whether a gift, which is ostensibly made to a member of a candidate's or an official's (hereinafter "official") immediate family,<sup>3</sup> is considered a gift to the official, and if so, how it is to be valued.

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<sup>2</sup> *Prenote Discussion of Amendments to Regulations 18942 and 18944 – Gift Regulations Involving Wedding Gifts, Baby Showers and Receptions*, Legal Division memorandum to Chairman Randolph and Commissioners, January 25, 2006; *Adoption of Amendments to Regulation 18942 –the Gift Regulation Involving Wedding Gifts, Baby Showers and Receptions; and an Update on Regulation 18944*, Legal Division memorandum to Chairman Randolph and Commissioners, April 11, 2006.

<sup>3</sup> "Immediate Family" means the spouse and dependent children of an official. (Section 82029.)

The general rule is that gifts to the spouse or dependent child of an official are neither prohibited nor reportable under the Act.<sup>4</sup> However, the mere fact that a gift is given directly to, addressed to, or designated for an official's spouse or dependent child, is not conclusive for purposes of the Act. The Commission has recognized the potential problem of parties channeling gifts to spouses or children of officials in an effort to circumvent the gift prohibitions and to evade the purposes of the Act.<sup>5</sup>

In the *Cory* opinion, the Commission explored the issue of when a gift received by the spouse or dependent child of an elected official should be treated as a gift to the official under the Act. The Commission advised that, a gift made to a spouse or dependent child would generally not be considered a gift to the official unless: "(1) The nature of the gift is such that the official is likely to enjoy direct benefit or use of the gift to at least the same extent as the ostensible donee; and (2) The official in fact enjoys such direct benefit or use; and (3) There are no additional circumstances negating an intent to make an indirect gift to the official."

The first criterion is met if the official derives a direct benefit from use of the gift to the same extent as the official's spouse or dependent children.<sup>6</sup> However, even if the nature of the gift would be such that the official would likely enjoy a direct benefit, the official has not received the gift unless he or she in fact uses or derives a direct benefit from the gift.

Moreover, even if it is apparent from the nature of the gift that the official will benefit from the gift, and the official has in fact, used the gift, the third criterion may negate the donor's intent to make a gift to the official.

The Commission stated, "In particular, the existence of a working or social relationship between the donor and the spouse or child will rebut any inference that the donor intended to make a gift to the official." For example, if the spouse of an official received a retirement gift, such as a painting, from his or her employer, the relationship between the spouse and employer could rebut the presumption that the gift was intended for the official, even if the official benefits from the gift.

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<sup>4</sup> The Commission stated in the *Cory* opinion that gifts to spouses and dependent children of officials are not prohibited by sections 86203 and 86204, nor are they reportable under section 87207. Gifts to a spouse of an official is the separate property of the spouse, thus an official does not have a community property interest in such a gift. (*Cory* opinion, p. 3.)

<sup>5</sup> See *Cory* opinion, p. 2; also staff has noted that delivering a gift to a family member of an official may be a way to circumvent the protections of the Act. "Prenotice Discussion of Gift Regulations," Legal Division memorandum by Mark T. Morodomi, July 26, 1991, pg. 9, footnote 13.

<sup>6</sup> The Commission stated, "For example, a work of art, a television set or packaged foods and beverages are, by their nature, likely to be shared and thus the official is likely to enjoy direct benefit or use of these gifts. On the other hand, an article of clothing, a wrist watch or a free hang gliding lesson given to the spouse or dependent child of an official would not directly benefit the official, and it cannot be anticipated that the official would use the gifts. Accordingly, such gifts would not, absent unusual circumstances, be gifts to the official."

This third prong of the *Cory* opinion dealing with donor intent has *not* been codified<sup>7</sup> in regulation 18944. However, it has been reflected in subsequent staff advice over the years.

For instance, in the *Combs* Advice Letter, A-87-141, staff advised that there was no reportable gift received by an official who shared with his spouse free use of a condominium in Hawaii. The gift was provided by the spouse's employer, who was only casually acquainted with the official. The spouse asked her employer for permission to share the condominium with her husband (the official) and permission was granted. Staff concluded that because a working relationship existed between the donor and the spouse of the official, use of the condominium by the official under these circumstances was not a gift to the official. The facts showed that "there was no intent by the donor to give a gift to [the official]."<sup>8</sup>

However, advice reflected in the *Combs* letter appears to contradict the literal language of regulation 18944. Subdivision (a) states that, "Gifts given directly to members of an official's immediate family are not gifts to the official unless *used* or disposed of by the official..." [Emphasis added.] In addition, subdivision (d) of the regulation states that, "If the official enjoys direct benefit from a single gift, as well as members of the official's family, the full value of the gift is attributable to the official."

In the situation described in the *Combs* letter, the gift was given directly to the official's spouse, but the official also "used" the gift by sharing the condominium with his spouse. Therefore, under a literal reading of the regulation, the official has received a gift. Moreover, use of the condominium was a single gift enjoyed by both the official and his spouse. Thus, under subdivision (d) of the regulation, the full value of the gift would have been attributed to the official.

The proposed amendments to regulation 18944 attempt to both clarify and harmonize regulatory language with Commission opinion and subsequent staff advice.

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<sup>7</sup> There have been past attempts to amend the regulation, notably in 1991 and 1992, when the Commission undertook a major revision of its "gift" regulations. One proposal involved amendments that would reflect subsequent staff advice which turned on the *intent* of the donor in determining whether the gift would be attributed to an official or his or her family member. Staff noted that delivering a gift to a family member of an official may be a way to circumvent the protections of the Act. However, numerous discussions and proposals to amend the regulation were not successful, as the regulated community, including leaders of the state Senate and others, vigorously opposed the changes because "revising the regulation would create unsuspected pitfalls for public officials." The Commission decided not to move forward with any revisions to the regulation.

<sup>8</sup> The *Combs* letter also provided an alternative reason for concluding that the official did not receive a gift under the circumstances. The official was advised that he was not required to report his use of the condominium on his statement of economic interests because the use of the condominium was controlled by his spouse and, hence, the gift to him was a gift from his spouse. "A gift from one's spouse is not a 'gift' within the meaning of the Act. (Section 82028(b)(3).)"

*Public Comments*

At its February 2006 meeting, the Commission held a discussion regarding possible adoption of proposed amendments to regulations 18944 and 18942, which at the time, were combined as one regulatory project.<sup>9</sup> At the meeting, Commissioner Downey suggested a minor clarifying change that would state that the gift rules expressed in regulation 18942 and other related regulations (which include 18944) are pursuant to, or for the purposes of, section 82028. This suggestion is also incorporated in the opening sentence of regulation 18944(a).

Public comment was also received from Scott Hallabrin, of the Assembly Ethics Committee, who also submitted proposed language amending the regulation. He stated at the February meeting, and again at the interested person's meeting in May, that regulation 18944 was confusing and could be written more clearly. Mr. Hallabrin said that the language in one part of the regulation, specifically subdivision (d) as currently written, seemed to "swallow up everything above it" because it states that when an official enjoys a direct benefit from a gift, the whole value is attributed to the official. In his view, this seems to negate the exceptions to the rule as described in the prior subdivisions (a)-(c). He added that this made it unclear as how to apply the regulation.

Mr. Hallabrin also suggested incorporating the third prong of the *Cory* opinion which deals with circumstances negating an intent to make an indirect gift to the official. He said that codifying this part of the opinion would also clear up much of the confusion in the regulation and would reflect views expressed in various advice letters over the years.

These suggestions and other comments<sup>10</sup> have been taken into consideration and incorporated in proposed amendments to regulation 18944, as discussed below.

### **III. PROPOSED AMENDMENTS TO REGULATION 18944**

The proposed amendments to regulation 18944 would:

- Make a minor, clarifying change by slightly rewording and moving up section (d) of the current regulation, and making it the new subdivision (a) to state that: "For purposes of Government Code section 82028, a single gift given to both a public official or candidate ("hereinafter "official") and one or more members of the official's immediate family is a gift to the official for the full value of the gift."

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<sup>9</sup> This project was originally part of the Wedding Gifts/Baby Showers and Receptions project. At the May Commission meeting the Commission approved a proposal to split this item from the other project (amendments to regulation 18942) and consider it as a separate item.

<sup>10</sup> Also present at the IP meeting was Michael D. Martello of the League of California Cities, FPPC Committee, who stated that the area of gifts, and particularly donor intent, are difficult areas to regulate. He stated that "sometimes you have to be careful about making the gift [regulations] more complicated than they are because they're hard to understand now."

- Create a new subdivision (b) that rewords and incorporates the substance of the current regulation's subdivisions (d), (a) and (c), respectively into subdivisions (b)(1), (b)(2) and (b)(3).<sup>11</sup> The changes are intended to more clearly reflect the factors specified in the *Cory* opinion with regard to when a gift to an official's immediate family member may be deemed a gift to the official. These factors can be found in the substance of the current regulation, but are not broken out into discrete subject matter categories – such as “benefit,” “use,” or “discretion and control”—as is reflected in the proposed language.

The new subdivision (b) would state that:

~~“(b) (a) A Gifts gift given directly to an members of an official's immediate family are-is not a gifts to the official unless it confers a personal benefit on the official. A gift confers a “personal benefit” on the official when any of the following factors apply: used or disposed of by the official or given by the recipient member of the official's immediate family to the official for disposition or use at the official's discretion.~~

**(1) Benefit:** The official enjoys direct benefit from the gift, except for a benefit of nominal value;

**(2) Use:** The official uses the gift, and the official's use is not nominal or incidental to the use by the immediate family;

**(3) Discretion and Control:** The official exercises discretion and control over who will use the gift or disposes of the gift.”

- Add a new subdivision (c) to codify the third prong of the *Cory* opinion dealing with circumstances negating a donor's intent to make a gift to an official, which staff has been reflected in prior advice. This new section also incorporates the language in subdivision (b) of the current regulation, with regard to the manner in which a gift is offered or delivered.<sup>12</sup>

The proposed language in subdivision (c) would provide officials with clearer guidelines and would reflect the Commission's long-standing position regarding factors used to evaluate whether a gift was truly intended for an official's family member. This subdivision provides a

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<sup>11</sup> The substance of the current regulation, subdivision (d) is incorporated in the proposed language under subdivision (b)(1), while the substance of subdivision (a) is incorporated into proposed language in subdivision (b)(2). The substance of subdivision (c) of the current regulation is reflected in proposed language under subdivision (b)(3).

<sup>12</sup> Regulation 18944(b) currently states that, “Gifts delivered by mail or other written communication are given directly to members of the official's immediate family if the family members' names or familial designations (such as “spouse”) appear in the address on the envelope or in the communication tendering or offering the gift, and the gift is intended for their use or enjoyment.” This amendment is not intended to alter or supersede, in anyway, rules reflected in regulation 18624, which defines circumstances in which a lobbyist “arranges for making of a gift.”

non-exclusive list of factors that may negate a donor's intent to give a gift to a public official because the gifts are clearly made to an official's spouse or family member.<sup>13</sup>

The new subdivision (c) would state that:

“(c) Notwithstanding the provisions of subdivision (b), a gift given to a member of an official's immediate family is not a gift to the official, if the official can otherwise show that there was no donor intent to make a gift to the official. Factors that may negate a donor's intent to make a gift to a public official include, but are not limited to, the following:

(1) Relationship between donor and recipient: The existence of a working or social relationship between the donor and the official's spouse or immediate family member.

(2) Nature of the gift: It is clear from the nature of the gift that only the official's immediate family members can use or enjoy direct benefit from the gift.

(3) Manner in which the gift is offered or delivered: The gift is offered or delivered to a member of the official's immediate family in a manner, and under such circumstances, that it is clear there is no intent to make a gift to the official. Such circumstances include a gift offered in writing, or delivered by mail or other written communication, to the official's family and the name or familial designation (such as “spouse”) of the member or members of the immediate family appear on the envelope or in the communication rendering or offering the gift, and the gift is intended for the family member's or members' use or enjoyment.”

These proposed amendments are intended to clarify existing regulatory language and to further codify the Commission's *Cory* opinion. They changes are also intended to clarify that gifts given to an official but intended for use by the official's child, (such as baby shower gifts) are gifts to the child.

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<sup>13</sup> The proposed language in subdivision (c) is not intended to alter or construe any provision of section 86201, 86203 or 86204, which applies to lobbyists. Section 86201 defines “gift” in the lobbying context to include “a gift made directly or indirectly to any state candidate, elected state officer, or legislative official, or to an agency official of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist.” Section 86203 defines “unlawful gifts” in a lobbying context, stating that, “It shall be unlawful for a lobbyist, or lobbying firm, to make gifts to one person aggregating more than ten dollars (\$10) in a calendar month, or to act as an agent or intermediary in the making of any gift, or to arrange for the making of any gift by any other person.” While section 86204 deals with receipt of unlawful gifts from lobbyists: “It shall be unlawful for any person knowingly to receive any gift which is made unlawfully by Section 86203.”

Although not specified in the regulation,<sup>14</sup> such gifts would generally not be considered to confer a “personal benefit” on an official under factors outlined in subdivision (b) of the proposed amendments. For instance, an official would not likely derive a direct benefit from presents specifically intended for an infant, such as baby clothing, toys or formula.<sup>15</sup> Nor would the official likely be able to use such a gift in a fashion that is more than nominal or incidental to use by the child. Lastly, if such a gift was given directly to the official but was specifically intended for, and actually used for the benefit of the official’s child, the official would not have used his or her own discretion and control in disposing of the gift.

The amendments would also reflect the Commission’s view regarding circumstances that negate a donor’s intent to make an indirect gift to an official, as reflected in the Commission’s *Cory* opinion—such as the relationship between the donor and recipient, the nature of the gift, or the manner and circumstances in which the gift is offered or delivered.

#### **IV. STAFF RECOMMENDATION**

Staff recommends that the Commission approve for adoption the proposed amendments to regulation 18944.

Attachment:

Proposed amendments to regulation 18944

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<sup>14</sup> Staff discussed the issue of including a specific reference to baby shower gifts during various meetings to discuss proposed regulatory language. There was a consensus that baby shower gifts should not be singled out so that the regulation could be more broadly applied to include all gifts intended for an official’s dependent children.

<sup>15</sup> In the *Cory* opinion (page 5, footnote 6) the Commission stated, “We also should observe that in the situation in which from the nature of the gift it would not be expected that the official would enjoy equal benefit or use, we do not believe a gift has been made to or received by the official even if for some reason he or she does use or directly benefit from the gift. This assumes, of course, no prearrangement to make a gift indirectly to the official.”